

Kentucky Real Estate NEWS

A Publication of the Kentucky Real Estate Commission

Michael Plummer Appointed as the Consumer Member



On July 25, 2005, Governor Ernie Fletcher appointed Michael Plummer as the newest Commission member. Mr. Plummer was appointed to serve a four-year term as the consumer member.

Mr. Plummer was born in Augusta, Kentucky. His career began in 1984, when he graduated from the

Cincinnati College of Mortuary Science with an Associate Degree in Mortuary Science. From 1984 to 1995, Mr. Plummer was the Funeral Director for Allison & Rose Funeral Home in Covington, Kentucky. In 1991, he earned his Bachelor of Science in Public Administration. In 1994, he obtained his Juris Doctorate from the Salmon P. Chase College of Law and began his second career practicing law. Mr. Plummer owns his own law practice in Covington, Kentucky.

Mr. Plummer is a member of the Kentucky and Cincinnati Bar Associations, the Golden Rule Masonic Lodge and the Indra Consistory Scottish Rite. He is also a member of the Kenton County

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On July 13, 2005, under the terms of a settlement with the U.S. Department of Justice Antitrust Division, the Kentucky Real Estate Commission agreed to stop enforcing regulations that restricted the use and advertisement of rebates, inducements or discounts by KREC licensees. The proposed Amended Final Judgement effecting the settlement and a letter of explanation were mailed to each KREC licensee. Any licensee who did not receive this mailing may request another copy. Links to the proposed Amended Final Judgment and the explanatory letter can also be found on the "Real Estate Licensing Laws in Kentucky" and "Legal Information" pages of the KREC web site, www.krec.ky.gov.

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Director of Administration

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Comments from the Chair

by: Sue Teegarden,
Chair



I am pleased to announce that the Commission won the 2005 Association of Real Estate License Law Officials' (ARELLO) prestigious "Communication Award" for our newsletter. ARELLO is the international organization for real estate commissions and boards and its members not only include all of the states in the United States but also many countries around the world. The Commission has always strived to deliver an informative newsletter that is aesthetically pleasing and easy to read. The articles are carefully thought out, and we try to include topics and materials that are pertinent to the current needs of the licensees. Please know that you can submit topics for inclusion in the newsletter and that we welcome any and all suggestions. I would like to personally thank Shelly Saffran and Lee Harris for all their hard work on the newsletter. Congratulations!

Another service that I am very proud of is the "same day response" approach that we strive to deliver. On average, the Commission receives over one hundred pieces of mail each day. We receive various legal documents, educational documents from licensees and continuing education providers as well as many licensee transfers, name and business changes and new applicant forms. We understand that most of these documents need immediate atten-

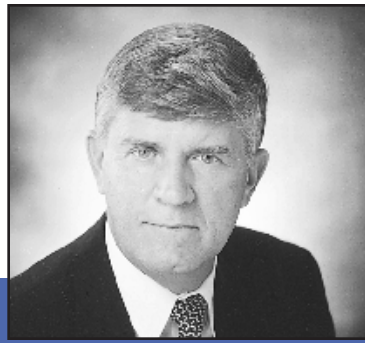
tion, and the staff tries very hard to process all of these requests the same day they are received. We appreciate the fact that licensees do not want to wait a week for their licenses to be transferred from one company to another and that new applicants are usually excited to get started. I hope that you appreciate all of the efforts of the staff. They all do a great job and take pride in giving you wonderful and prompt service.

Another service that we provide is a "live voice" when you call the Commission. Callers do not have to go through an automated system when trying to get answers to their questions. Our receptionist handles hundreds of calls each day, and if she cannot answer your question, you are usually immediately connected with someone who can. The staff also tries to return all calls the same day they are received.

Our web site is also a very informative tool for licensees. We have forms and documents available for you to use in case your question comes up after our office has closed. The site is maintained on a daily basis and changes are made immediately to ensure that the most accurate information is available to you. If you have not taken a look at the Commission's site lately, please take a moment to scroll through the various items that are available.

From the Director's Desk

by: Norman E. Brown,
Executive Director



"The Seven Year Itch"

My seventh year at the Commission is coming to a close, and I thought it might be interesting to list the changes that have taken place at the Commission over the last seven years.

One of the first things to happen when I came to the Commission was to begin putting a state-wide face on the Commission staff. At the direction of the Commissioners, the staff was encouraged to get out and attend company meetings, seminars and REALTOR® Association functions. Hopefully, General Counsel Lee Harris and I have both been to your area and, if not, please know that we are available to give presentations. In addition, Commissioners and staff have attended every Kentucky Association of REALTORS® convention and have sponsored speakers for several of those conventions over the past seven years.

As a former educator myself, I wanted to implement a program for high school students to learn about the home-buying process and about good credit. Education Director Linda Poliskie and I began working on this program through a Commission-sponsored grant. The Home Sweet Home program has now been used by high school teachers throughout the state for over five years. We were also pleased to have won the 2001 ARELLO Education Award

for this program. We have also implemented and won the 2003 ARELLO Award for our brokerage management course.

In addition, the complaint process has been overhauled. Our settlement process has resulted in the resolution of about ninety percent (90%) of our complaints. This has also reduced the time frame of the complaint process from about two years to approximately nine months.

We have put out an updated real estate law textbook and have sent a copy of the book to almost 5,000 brokers throughout the state. This book can also be found on our web site, free of charge.

The industry as a whole has certainly changed over the last seven years. One noticeable change is the number of licensees. We will have about thirty-three percent (33%) more applicants this year than last year. Of course, over the past few years, the industry has seen incredibly low interest rates, and, as a result, real estate sales have been booming across the nation.

The actual face of our Commission has also changed. We have had four new Commissioners over the past seven years. Under their leadership, the Commission continues to strive to meet the needs of consumers and licensees and to keep up-to-date with the ever-changing real estate industry.

Don't Pay the Fine - Get Your C. E. On Time

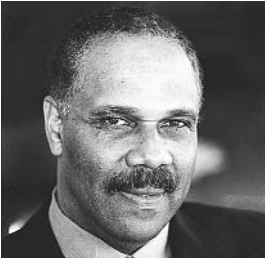
All active licensees (except those who were licensed in Kentucky prior to June 19, 1976) must complete six (6) hours of continuing education by December 31, 2005. Keep in mind that three (3) of the hours must be in law. Active licensees must also complete the Kentucky Core Course once every four (4) years. If you took the Core Course this year, it fulfills your six (6) hour continuing education requirement and no other education is needed in 2005. If you have not completed the required continuing education and plan to put your license into escrow, you must submit a signed written letter requesting to be placed in escrow along with a \$10.00 check, and it must be postmarked on or before December 31, 2005. Otherwise, you will be considered as delinquent and subject to penalties for not completing the continuing education in a timely manner. For a complete list of providers, log on to our web site at www.krec.ky.gov and reference the Education Department.

Under KRS 324.160(4)(p), a real estate licensee may not attempt to obtain a brokerage agreement with a consumer, knowing that the consumer has an outstanding exclusive agency agreement with another broker. Recently, several licensees have inquired as to whether this prohibition applies to property management agreements as well as listing agreements. This statute applies to any exclusive agency agreement, whether it be for property management or for a sale.

Commissioner's Corner



Sue Teegarden



Ron Smith



Arvel J. McMahan



Michael Plummer



Lois Ann Disponett

Inducement and Rebate Ban is Lifted

By: Lee B. Harris, General Counsel

On July 15, 2005, the Commission and the Department of Justice filed an Amended Final Judgment in the federal court. On July 13, 2005, the Commission filed emergency regulations with the Legislative Research Commission. Regulation 201 KAR 11:011 defines the terms "inducement" and "rebate." Regulation 201 KAR 11:121 states that a licensee may advertise and provide any inducement or rebate, so long as it is disclosed in writing.

In August, the Commission sent out a letter of explanation, a copy of the Amended Final Judgment and a copy of these regulations to all 26,500 licensees in the state. In addition, the Commission has: 1) posted a notice on its web site at www.krec.ky.gov; 2) amended all of the pre-licensing, continuing education and brokerage management course information; and 3) amended all of the pertinent articles on our web site. The Commission will continue to send notices to all new licensees for a period of three (3) years. On August 25, 2005, the Commission held a public hearing on the regulations. The Commission is in the process of updating the license law tutorial found on our web site as well as the sales associate's and broker's examinations.

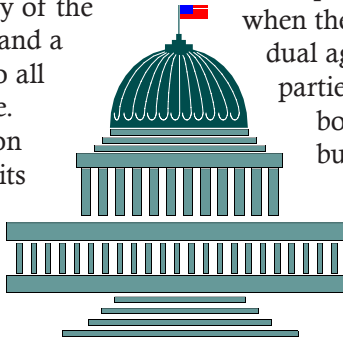
The Commission has received numerous questions regarding the ramifications of these law changes. Most of these questions are about what types of inducements and rebates can be offered. The answer is that any type or amount of inducement and rebate is acceptable, so long as it is disclosed in writing. There is nothing in the regulation that specifies where the disclosure should be

made. Therefore, licensees may include the disclosure in the purchase contract, the listing contract or on a separate document. (The Commission specifically ruled that closing gifts and meals do not have to be disclosed in writing.)

The Commission has provided a sample disclosure on our web site. You may use the Commission's disclosure, your company's disclosure or your attorney or local Board of REALTORS® may develop one. There is nothing specific in the regulation that would require both parties to know what is being offered or given to the other party. (The exception to this rule would be when the licensee is involved in dual agency. In dual agency, all parties should have the same body of knowledge, so the buyer and seller would need to know what inducements or rebates had been given to the other party.)

These new law changes do not in any way affect referral fees to unlicensed individuals. Referring or offering to refer is licensed activity under KRS 324.010(1). Therefore, only licensed brokers may pay and only licensed brokers may receive referral fees for referring a client or customer to another licensee. **The Commission has received numerous inquiries about whether these new laws would now allow referral fees to unlicensed individuals, and the answer is no. The definition of "rebate" found in the Amended Final Judgment and in the new regulation specifically excludes monies paid for real estate brokerage, including such referral fees.**

The Commission's legal staff is available to answer any questions you may have about these new laws.



Just Because You Have E & O Insurance Does Not Mean You Are “Covered” For Everything!

By: Shelly Saffran

Director of Administration

Lately, there has been an increase in the number of calls I receive from licensees wanting to know exactly what is covered under the group Errors and Omissions insurance. Specifically, licensees seem to think that since they have Errors and Omissions (E & O) insurance they are covered for anything that happens while practicing real estate. This is simply not true. Although E & O is the only insurance mandated by the Commission, we also highly recommend that licensees explore other insurance policies that may be needed to ensure they are covered for anything that might happen.

For example, I took a call a few weeks ago from a licensee who was very upset to learn that he was not covered for a claim involving property that he owned and sold. Under the group E & O policy, if a licensee or the licensee's spouse owns or has more than a 10% financial interest in a piece of property, any claims concerning that property are excluded. Many people ask why that is an exclusion. Cindy Rice Grissom of Rice Insurance Services Company, LLC (the group E & O administrator), says that the policy is designed to cover errors and omissions arising out of professional services as a real estate licensee. If the licensee is the owner of the property, it is likely that the claim arose because the licensee owned the property and not because of the licensee's professional services. If coverage were provided where the licensee owned the property, the licensee would be able to benefit from his/her own errors and omissions. For example; if the licensee/owner failed to disclose that the roof needed replacement, then he/she as the owner, received an inflated value for the home due to the nondisclosure. There is a way for the real estate firm to protect its interests when one of its licensees sells a property in which he/she has a personal interest. If the developer, builder or owner (or spouse) lists the property in writing with another licensee at the same firm, then the listing agent will be covered and the firm will be covered for the acts of the listing agent. This can be accomplished by the following procedure: (1) the property should be listed by an Insured Licensee who is not the property

owner, builder or developer (or spouse), and (2) the property should be advertised, marketed, and promoted by the Insured Licensee who is not the property owner, builder or developer (or spouse), and (3) all Professional Services related to the transaction, including the sale or closing on the property, are conducted by an Insured Licensee who is not the property owner, builder or developer (or spouse). The transaction would have to otherwise be covered by this policy. Please note that there will still be no coverage for the developer, builder or owner (or spouse), since it is assumed that the Claim may arise out of his/her personal interest rather than out of his/her Professional Services as a real estate licensee.



Another example is when I had to explain recently to a licensee that property damage was not covered under the errors and omissions policy. This individual had a piece of property listed that sustained heavy damage and the licensee was being sued.

Unfortunately in this case, E & O does not cover claims for property damage. I even had a recent call from a licensee who was under the assumption that errors and omissions insurance would cover her car accident since she was “practicing real estate” when she wrecked her car.

These are just a few examples of the many calls I receive from licensees who are not aware of the exclusions in the group E & O policy. You can find the exclusions in 201 KAR 11:220 as well as in the policy you receive from the group insurance provider, Rice Insurance Services Company, LLC. Keep in mind that you do not have to buy the Commission's group insurance policy and that licensees are free to shop for the best E & O coverage available for their needs. Currently, we have 13,594 licensees who have the Commission's group policy and 1,750 who have private E & O insurance. If you do not carry the group plan, I still strongly suggest that you take a long look at the exclusions listed in your policy.

If you are a licensee who specializes in remodeling, construction or development you should know that any real estate activity for these properties is excluded in the

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Disciplinary Actions



Richard Rowe (Stanford) Case No. 03-0033

Violation: Mr. Rowe stipulated to a violation of KRS 324.160(4)(v) for engaging in conduct that constitutes improper --- not fraudulent or dishonest --- dealing.

Disposition: Mr. Rowe's license was revoked for two (2) additional years beyond the period of revocation ordered on January 23, 2002 in Case No. 01-0098.

Erica A. Jenkins (formerly Erica A. Rowe) (Stanford) Case No. 03-0033

Violation: Ms. Jenkins (formerly Erica Rowe) stipulated to a violation of KRS 324.160(4)(e), resulting from her failure to disclose, in writing on a purchase contract, her status as a licensee.

Disposition: Ms. Jenkins agreed to pay a fine in the amount of two hundred fifty dollars (\$250.00). This fine shall be in addition to any amounts owed by her if and when she seeks reinstatement of her license from the Commission. Ms. Jenkins also agreed to attend and successfully complete six (6) hours of continuing education in law, in addition to the already mandated hours.

Robert L. Hall, Jr. (Petersburg) Case No. 05-0089

Violation: Mr. Hall was in violation of KRS 324.160(4)(j) for being convicted of a felony while holding a Kentucky real estate license.

Disposition: Mr. Hall's license was placed on probation for five (5) years. Should Mr. Hall have any additional convictions during the next five (5) years, his license will be revoked.

George Williamson (Louisville) Case No. 04-0054

Violation: Mr. Williamson agreed that pursuant to an audit conducted by the Commission, he violated KRS 324.160(4)(u) for violating KRS 324.111, 201 KAR 11:250, Section 2(2), 201 KAR 11:062, 201 KAR 11:011(6), and 201 KAR 11:245, Section 2(5), for failing to document the date and time of acceptance on a purchase contract, for failing to retain business records for a business that he sold, for failing to advise the Commission of a newly opened escrow account and for failing to comply with property management regulations.

Disposition: Mr. Williamson agreed to a twelve (12) month probation period on his license and to pay a fine in the amount of one thousand dollars (\$1,000.00). He also agreed to complete an additional twelve (12) hours of continuing education, in addition to any hours already required by law.

Michael P. Ziegler (Hebron) Case No. 04-0038

Violation: Mr. Ziegler stipulated to a violation of KRS 324.160(4)(v) for improper conduct for: 1) transferring a purchase agreement and escrow money to his new company before resigning from his previous broker, Huff Commercial Group; (2) amending a blank Huff Commercial Group contract to have the commission paid to him at his new company; and 3) failing to notify his previous broker of the existence of this contract and escrow money, even though the agreement was signed before Ziegler left the previous broker's employ.

Disposition: Mr. Ziegler agreed to pay a fine in the amount of one thousand dollars (\$1,000.00), to accept a formal reprimand from the Commission and to have his license placed on probation for a period of twelve (12) months.

Deborah Richardson

(Louisville) Case No. 04-0237

Violation: Ms. Richardson stipulated to a violation of KRS 324.160(4)(u), specifically, 201 KAR 11:105, for publicly advertising or promoting property by placing a sign on it before she had a valid written listing agreement.

Disposition: Ms. Richardson agreed to pay a fine in the amount of two hundred fifty dollars (\$250.00) and to successfully complete three (3) hours of continuing education in law, in addition to any hours already required by law.

Doris Ingram (Louisville)

Case No. 04-0096

Violation: Ms. Ingram stipulated to a violation of KRS 324.160(4)(u) for violating 201 KAR 11:121 and KRS 324.020(4) by failing to verify information on a multiple listing sheet and by failing to exercise exclusive control over her company's escrow account.

Disposition: Ms. Ingram will pay a sum in the amount of two thousand dollars (\$2,000.00) to the complainants in this matter, and she will complete three (3) hours of continuing education in law, in addition to any hours already required by law.

Continued on Page 10

Education, Research and Recovery Fund Annual Statement of Income and Expenses for Fiscal Year Ending June 30, 2005

Income FY 2003/2004

| | | | |
|----------------------------|-------------------|--------------------------------|---------------------|
| Exam Recovery Fee | \$ 63,660 | Speaker Fees | 3,100 |
| Reciprocal Recovery | 3,420 | Room Rental | 2,931 |
| Renewal Recovery | 632,575 | Computer Maintenance | 2,040 |
| Core Course | 7,840 | Postage/Parcel Delivery | 3,663 |
| Fines | 7,900 | Postage/Meter & Bulk | 55,669 |
| Education Fines | 67,800 | Printing State | 14,187 |
| Investment Income | 35,510 | Printing Vendor | 117,260 |
| Restitution | 5,500 | State Fair | 4,975 |
| Unlicensed Practice Refund | 3,870 | Advertising | 3,084 |
| Prior Year Grant Refund | 69,124 | Cassettes/Books | 1,402 |
| Unused Postage | 167 | In-State Travel | 14,096 |
| TOTAL INCOME | \$ 897,366 | Travel for non-state employees | 1,151 |
| | | Airfare | 3,795 |
| | | Out of Pocket Expenses | 46 |
| | | Lodging | 7,229 |
| | | Meals | 1,220 |
| | | Mileage | 738 |
| | | Registration Fees | 9,045 |
| | | On-line subscriptions | 4,580 |
| | | Transportation | 1,536 |
| | | Equipment over \$5,000 | 14,759 |
| | | Subpoenas/Court Fees | 3,420 |
| | | Subscriptions | 831 |
| | | Seminar Refreshments | 5,919 |
| | | College Grants/Scholarships | 300,000 |
| | | TOTAL EXPENDITURES | \$ 1,045,975 |

Expenditures FY 2003/2004

| | | | |
|---|-----------|-----------------------------|---------------------|
| Personnel | \$177,908 | Registration Fees | 9,045 |
| Legal Services (Attorney General) | 28,728 | On-line subscriptions | 4,580 |
| Legal Contract | 19,836 | Transportation | 1,536 |
| Continuing Ed. Services | 75,000 | Equipment over \$5,000 | 14,759 |
| Investigative Services | 165,815 | Subpoenas/Court Fees | 3,420 |
| Expert Witness | 500 | Subscriptions | 831 |
| Carpool | 484 | Seminar Refreshments | 5,919 |
| Court Reporter | 575 | College Grants/Scholarships | 300,000 |
| Contract Attorney Fees ** add to Legal Contract | 453 | | |
| | | TOTAL EXPENDITURES | \$ 1,045,975 |

E & O Insurance

Continued from Page 5

group E & O policy. You might consider either purchasing separate insurance for these activities or trying to obtain an endorsement to include real estate activities for these properties.

In order to make sure you are covered for personal injury, property damage and bodily injury you should at least carry a General Liability policy in addition to your E & O policy. In today's litigious society, even a small claim could turn into a huge lawsuit and you want to be covered if and when that happens. Although I cannot recom-

mend specific companies for general liability insurance, you can use the Internet as a tool for exploring the different policies available to you. I noticed that many of the sites I visited had free rate quote boxes and went into detail about the different coverage they offer which are specific to real estate licensees.

Other coverages are also available from the Commission's group insurance carrier. One that is becoming popular is environmental coverage. This includes coverage for pollutants and mold. Licensees may purchase the Limited Claims Expense Coverage Environmental Endorsement which provides up to \$2,500 claims expenses per claim and \$5,000 annual aggregate for the

defense of any claim or lawsuit alleging the insured licensee's failure to detect, report, assess the effects of or advise of the existence of pollutants, fungi or microbes. This endorsement can be purchased for \$15.00 per licensee directly through Rice Insurance Services Company by calling 1-800-637-7319.

Licensees who are concerned about coverage for damages and higher defense costs for these risks should purchase separate coverage for these risks as well (although this coverage is very expensive and hard to find.)

Should you ever have any questions concerning your Errors and Omissions insurance coverage, please do not hesitate to give me a call at the Commission.

Remembering the Legacy of Joseph B. Helm, Jr.



Former KREC Executive Director, Joseph B. Helm, Jr., died on September 18, 2005 from injuries he sustained in a car accident. He was 47 years old and leaves behind his wonderful wife, Rose, and their beautiful daughter, Abby.

Joe came to the Commission in 1996 after being appointed by Governor Patton. He brought with him a vast knowledge of the real estate industry and a keen business mind. He was a visionary and had a mission to accomplish great things at the Commission.

One of Joe's first tasks was to improve communications between licensees and the Commission. Under his direction, the Commission's web site and e-mail capabilities were implemented. Although he was intense about advancing the Commission into the 21st century, he also had a strong passion for education. He was the mastermind behind the idea and implementation of the mandated Kentucky Core Course. In addition to this, Joe also wanted to streamline the legal process through mediation. He introduced the Commission to the settlement approach rather than the hearing approach, thereby decreasing not only expenses, but also the length of time to process complaints.

Another one of Joe's accomplishments was the introduction of a newly designed newsletter. He consulted with a graphics arts firm, purchased new state-of-the art software, and the freshly designed newsletter was unveiled in the

Spring of 1997. He was very proud of the newsletter and believed that by developing an informative and nicely designed newsletter, more licensees would read it and stay abreast of the ever-changing real estate industry. He was told right before his death that the Commission had won the 2005 ARELLO Communication Award for the newsletter. He responded by saying, "Well, it's about time."

Joe was a man of strong morals, wisdom and vision. His legacy at the Commission speaks for itself, and he will be sorely missed by all that knew him. The Commission is a better place because of him, and his accomplishments are still evident today.

Joe was laid to rest at Cave Hill Cemetery on September 22, 2005. Our thoughts, prayers and condolences go out to Rose and Abby and all who were privileged enough to know Joseph B. Helm, Jr.

"Escalating Clauses" Do Not Comply with License Law

**By: Lee B. Harris,
General Counsel**

The Commission is receiving numerous questions about so-called "escalating clauses" in purchase offers. An escalating clause is a provision in which a buyer states that he or she is offering a certain amount more than the highest offer, sometimes up to a certain dollar figure. Many Kentucky licensees are wondering if this type of clause is legal in this state.

For two reasons, this type of clause should not be used for Kentucky listings. First of all, a licensee has a duty to treat all buyers with honesty and fair dealing. If a licensee were to reveal a buyer's offer so that it could be bettered by another buyer, this action would be unfair. In addition, only the buyer with the escalating clause would have a fair shot at purchasing the property. The only fair way to handle a sale is to ask all buyers to put their best foot forward and to make their best offer.

Then, all buyers are on a level playing field, and all buyers have an equal chance to put in an offer acceptable to the seller.

Second, under 201 KAR 11:250, a purchase contract must contain certain provisions. One of those provisions is a purchase price. If a buyer makes an offer with an escalating clause, it cannot be a binding contract, if accepted. Rather, it would be an offer with a term left to negotiate. Such a contract would not comply with the cited regulation.

Understanding Commission Dispute Laws

(Excerpted from **Kentucky Real Estate Professionals and the Law**, Revised by Lee B. Harris)

A commission is the compensation paid to a real estate broker for representing a buyer or seller in the sale, lease or exchange of real estate. The amount of commission is generally based upon a contract entered into between the principal and the broker and is usually stated as a flat fee or a percentage of the gross sales price, depending upon the agreement.

Sometimes, disputes arise over whether a real estate agent has earned a commission pursuant to the agent's contract with his or her principal. These disputes may become extremely complex, especially when more than one real estate broker claims to have earned a commission or a portion of the commission for a particular real estate transaction.

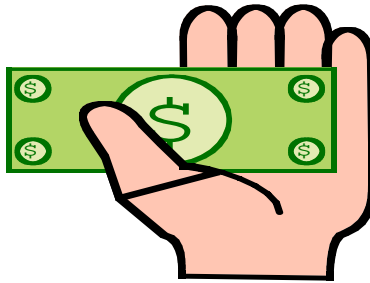
Kentucky courts have considered numerous issues relating to real estate commissions and when they are earned. As a general proposition of law in Kentucky, a real estate broker earns his or her commission either by producing a person who is at all times ready, willing, and able to purchase the property on the prescribed terms, or by obtaining from the prospective purchaser a binding contract that the landowner may then legally enforce. A "ready, willing, and able" purchaser is one who is prepared to accept the terms offered by the seller for the property and is financially able to consummate the sale. This does not mean that the purchaser must have cash in his or her pocket; rather, it means that he or she must be capable of financing the property on such terms as the parties to the contract agree.

If a broker secures a prospective purchaser who is ready and willing to consummate a real estate deal, but is subsequently discovered to be financially unable to purchase the property, the seller will normally not become liable to the broker for a commission

when that deal falls through.

However, if the broker produces a purchaser who is financially irresponsible yet the owner, with ample opportunity to satisfy himself or herself as to the purchaser's ability, decides to accept that purchaser and enters into a binding contract, the broker in that case may have earned a commission under Kentucky law.

It is important for real estate licensees to remember that procuring a ready, willing, and able purchaser is enough to secure a commission only if there is a clear contractual relationship between the principal and the licensee claiming the commission. The contract between these parties should



always be the first and primary focus in resolving any commission dispute. The listing contract can clarify or alter how and when a commission is earned. For example, the listing contract may provide that the commission is earned upon a sale or upon the procurement of a ready, willing and able purchaser, but it may also provide that no commission is earned unless a real estate transaction is closed. Or, the listing contract may specify some other time when the commission is due.

Courts frequently refer to the "procuring cause" of the sale in resolving a commission dispute. There is much confusion concerning the meaning and significance of the phrase "procuring cause." The procuring cause is defined as "the efforts of the agent or broker who effects the sale of realty and is therefore entitled to commission." Black's Law Dict. 7th ed. (1999).

A broker under an exclusive right to

sell contract is entitled to a commission if the property is sold during the listing period, regardless of who sells the property. In this situation a procuring cause is not important in determining a broker's right to a commission. However, in an exclusive agency listing or an open listing, where the broker's right to a commission is not absolute, procuring cause becomes very important. In a dispute between two or more brokers, it is not enough that a broker be the first to bring the seller and purchaser together. The broker must show that his efforts were the primary, predominant, efficient, or procuring cause of the transaction in order to be entitled to a commission. In addition, there are times when two or more agents have worked with a particular buyer on the same piece of real estate. In that instance, the two agents may both claim that they are entitled to the commission as the procuring cause of the sale.

It is important to remember that procuring cause and agency are two different and distinct concepts. In most instances, the procuring cause will also be the agent. However, disputes generally arise when more than one person may have acted as an agent for the same buyer or seller on a particular deal. The consumer has a right to be represented by whatever agent he or she chooses; however, that does not mean that that representative is entitled to a fee, if he or she cannot prove to be the procuring cause of the sale.

A broker's commission is based upon a listing agreement, and the absence of a written contractual agreement for the commission claim will result in no commission. Louisville Trust Co. v. Monsky, Ky., 444 S.W.2d 120 (1969).

The decision in Hamilton v. Booth, Ky., 332 S.W.2d 252 (1960), reinforces the premise that a purchase contract must be clear in order to serve as the basis for a commission. In this case, the broker filed a lawsuit claiming that he was entitled to a commission in the

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Disciplinary Actions

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Christine Roppel (Marietta, Georgia) Case No. 04-0053

Violation: Christine Roppel stipulated to a violation of KRS 324.160(4)(u), specifically, KRS 324.117(1) & (4), for failing to include the company name or principal broker's name in an advertisement on the web site address - Buyowner.com. The web site address, rather than the required company name or principal broker's name, was the only name that appeared on a sign that was placed in the yard of one of her listed properties.

Disposition: Ms. Roppel agreed to pay a fine in the amount of two hundred fifty dollars (\$250.00) and to successfully complete three (3) hours of continuing education in law, in addition to any hours already required by law.

David Bicker (Prospect) Case No. 04-0053

Violation: Mr. David Bicker stipulated to a violation of KRS 324.160(4)(u), specifically, KRS 324.117(1) & (4), for failing to include the company name or the principal broker's name in his advertisement on the web site address - Buyowner.com. The web site address, rather than the required company name or principal broker's name, was also the only name that appeared on a sign that was placed in the yard of one of his listed properties. Further, Mr. Bicker's name was improperly included in several advertisements at the web site as the contact person for properties that were not listed by him.

Disposition: Mr. Bicker agreed to pay a fine in the amount of five

hundred dollars (\$500.00) and to successfully complete three (3) hours of continuing education in law, in addition to any hours already required by law. Mr. Bicker violated his Settlement Agreement by failing to pay his fine in the agreed amount of time and was then fined an additional five hundred dollar (\$500.00) fine, making his total fines paid one thousand dollars (\$1,000.00).

Irvin J. Retzlaff (Sulphur) Case No. 04-0173

Violation: Mr. Irvin J. Retzlaff stipulated to a violation of KRS 324.160(4)(u), specifically, 201 KAR 11:400 and 201 KAR 11:250, for failing to provide agency disclosure forms and for failing to obtain the required information for the purchase contract that was executed in a real estate transaction in which he was acting in the capacity of a transaction broker. Specifically, the purchase contract failed to include the date and time of signatures for all parties who signed the contract, and it failed to include a possession date.

Disposition: Mr. Retzlaff agreed to pay a fine in the amount of two hundred fifty dollars (\$250.00) and to attend three (3) hours of continuing education in a Commission-approved contract law course and three (3) hours of continuing education in a Commission-approved agency course.

Darlene J. Kruessel (Bowling Green) Case No. 04-0117

Violation: Ms. Darlene J. Kruessel stipulated to a violation of KRS 324.160(4)(u) for violating 201

KAR 11:105 and 201 KAR 11:250 by unintentionally and inadvertently failing to obtain the signature of all property owners on a listing agreement and by unintentionally and inadvertently failing to obtain the consent of all property owners prior to promoting the property by placing a sign on it.

Disposition: Ms. Kruessel agreed to pay a fine in the amount of one hundred fifty dollars (\$150.00) and attend three (3) hours of continuing education in law, in addition to any hours already required by Kentucky law.

Alice R. Williams (Bowling Green) Case No. 04-0117

Violation: Ms. Williams stipulated to a violation of KRS 324.160(6) for unintentionally and inadvertently failing to adequately supervise a licensee.

Disposition: Ms. Williams agreed to pay a fine in the amount of one hundred dollars (\$100.00) and to attend three (3) hours of continuing education in law, in addition to any hours already required by Kentucky law.

Charles H. Padgett (Clarksville, Tennessee) Case No. 05-0139

Violation: Mr. Padgett did not complete three (3) hours of continuing education in law as required by a settlement agreement in a different case.

Disposition: Mr. Padgett was fined two hundred dollars (\$200.00) and was required to take three (3) hours of continuing education in law, in addition to any hours already required by law.

Commission Disputes

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amount of \$750 as the result of a sale of a farm. The record in the case revealed that there was no listing contract between the real estate broker and the owner of the farm. The only contract involved in the transaction was the real estate sales contract between the seller of the farm and a third party who purchased the farm.

The sales agreement was clearly a contract between the buyer and the seller. The real estate broker was neither a party to the contract nor was his contractual right to a commission clearly stated in the contract. Although the contract stated that the property was sold "through Bud Hamilton Realty Auction Company" on a printed form, the Court of Appeals concluded that those words standing alone were meaningless. If the broker wanted to recover on the basis of a sales contract, the Court of Appeals clarified that the sales contract would have to provide that he was a party to the contract and clearly specify the terms of the agreement for a commission.

The Commission strongly encourages licensees to avoid putting any type of commission agreement in the purchase contract. The purchase contract is an agreement between the buyer and the seller. Compensation should be negotiated and agreed to in a separate document, such as a listing agreement or a buyer/broker agreement. If no such agreement exists, the broker and the party paying the commission may enter into a separate written agreement. In addition, brokers should not try to change the offered commission split by putting a different figure in the purchase

offer. The listing broker sets the offered commission split.

No one can maintain a lawsuit to enforce a contract to pay for real estate brokerage services, unless the claimant is properly licensed under the real estate license law of the state of Kentucky. see KRS 324.020(4); Shelton v. McCarroll, Ky., 214 S.W.2d 396 (1948). Under the license law as amended in 1984, licensure is required for even one isolated sale. Therefore, no commission can be claimed by an unlicensed person for even one brokerage transaction.

An owner of property cannot arbitrarily conclude that a broker does not deserve a commission because of lack of diligence, if the broker has not entirely abandoned his or her duties. Even though the seller might feel that the broker is not acting diligently, the broker will be entitled to a commission if the broker produces a person that ends up purchasing the property directly from the owner during the time of the listing.

In Kentucky, where a listing contract clearly fixes the time limit for the sale of realty, in order to earn a commission, the broker must make the sale within such time. If the broker fails to secure the purchaser during the allotted time, and the owner thereafter sells the property to a purchaser produced by the broker, the seller is not liable for a commission, unless he or she deferred the sale for the purpose of circumventing the broker's right to a commission.

For more information on this subject, please go to Chapter 6 of Kentucky Real Estate Professionals and the Law. The book can be found on the Commission's web site or it can be purchased for \$30.00.

A Fond Farewell

The Commission would like to recognize the enormous contribution made by former Commissioner Bob Roberts. Mr. Roberts' term expired on July 24, 2005 after 16 years with the Commission. Mr. Roberts was an instrumental part of the Commission Board and, during his tenure, his knowledge was vital to the completion of many Commission tasks. In particular, Mr. Roberts played an extensive role in drafting errors and omissions insurance bid specifications and monitored the program closely over the years. With Mr. Roberts' insurance experience, he was able to guide the Commission through the entire process of establishing the mandated errors and omissions insurance program. Mr. Roberts was an active member of the Association of Real Estate License Law Officials and attended many conferences on behalf of the Commission. We thank Mr. Roberts for his service and dedication to the Commission. He will certainly be missed. We wish him good luck in all of his future endeavors.

Plummer Appointed

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Republican Party. Mr. Plummer is involved with various charities, including the Children's Home of Northern Kentucky and the Children's Rehabilitation Services in Fort Wright.

The Commission is very excited and fortunate to have Mr. Plummer join our team. He brings enthusiasm and knowledge to the job and was eager to get started. Mr. Plummer says, "I am very excited to accept the Governor's appointment and look forward to working with my fellow Commissioners and our super agency staff to ensure that we protect the public interest in real estate transactions as well as ensuring our licensees uphold the highest level of professionalism and integrity."

Mr. Plummer is married to Kimberly, and they have two daughters, Madeleine (age 10) and Meredith (age 5).

Welcome aboard, Mr. Plummer!

RE M I N D E R

Licensees are issued PERMANENT licenses. The only time a new license will be issued is when you make a change to that license, such as a name change or a firm change.

Due to low volume usage, the Commission's Fax-it-Back System has been shut down and is no longer an available service. All of the forms and documents are still available on the Commission's web site.

The Commission recently revised Regulation 201 KAR 11:062. The new version of this regulation requires a broker to retain a copy of all written offers in his or her official transaction file for a period of five (5) years. This revision means that brokers must retain a copy of all accepted and rejected offers. The purpose of this regulation is to ensure that there is a copy of all rejected offers in someone's file, in case those rejected offers need to be reviewed by a client or by the Commission. Therefore, the Commission is only requiring the rejected offers to be kept by the seller's broker on listed properties. If an agent is representing a buyer on a property being sold by owner, then the buyer's broker must retain a copy of the rejected offers.

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The Kentucky Real Estate Commission will be closed on:

November 11, 2005
(Veterans' Day)

November 24 & 25, 2005
(Thanksgiving)

December 23 & 26, 2005
(Christmas)

December 30, 2005
January 2, 2006
(New Year)